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January 7, 2010

VIA Electronic Mail

Michael Adackapara
Division Chief
California Regional Water Quality Control Board
Santa Ana Region
3737 Main Street, Suite 500
Riverside, CA 92501-3348

Dear Mr. Adackapara:

On behalf of the County of San Bernardino and the San Bernardino County Flood Control District (“SBCFCD”) (collectively “SBC”), this letter represents further supplemental comments of SBC to the December 14, 2009 version of Tentative Order No. R8-2010-0036, reissuing the Waste Discharge Requirements/National Pollutant Discharge Elimination System (“NPDES”) Permit No. CAS618036 (“Draft Permit”) for the SBCFCD, the County of San Bernardino, and the incorporated cities of San Bernardino County within the Santa Ana Watershed. SBC appreciates the Santa Ana Regional Water Quality Control Board’s (“Regional Board”) efforts in this matter, and the opportunity to submit these supplemental comments.

SBC has submitted previous comment letters to Regional Board staff dated September 9 (original comments), September 16 (supplemental comments), and October 20, 2009 (second supplemental comments), and incorporates such comment letters herein by reference. This third supplemental letter does not constitute a waiver of and expressly reserves the right to further object to any issues raised in SBC’s prior comment letters or any future, additional, or supplemental action taken by the Regional Board regarding the same or similar subject matters. SBC believes the issues described below have not been fully addressed by Regional Board staff to SBC’s satisfaction though the ongoing public comment process. SBC has worked and continues to work diligently with Regional Board staff to resolve these important issues in advance of the Regional Board’s January 29, 2010 hearing on the Draft Permit. However, in the event that such issues cannot be resolved, SBC requests that the Regional Board address these issues during such hearing.



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SBC notes that the deadline to submit written comments on the Draft Permit is not clear. Regional Board staff has provided different deadlines in the Draft Permit Transmittal Letter (January 7 deadline), and in the Notice of Hearing (January 15 deadline). Therefore, in an abundance of caution, we submit this comment letter by January 7 and, if necessary, will submit further comments to the Regional Board by January 15. We request that a number of remaining minor edits, redundancies, and typographic errors in the Draft Permit be corrected. Attached to this comment letter are “redline” versions of the Draft Permit (appended hereto as Exhibit A to this comment letter), Fact Sheet (appended hereto as Exhibit B to this comment letter), and Attachment 1-E to the Draft Permit (Monitoring and Reporting Program) (appended hereto as Exhibit C to this comment letter) showing SBC’s suggested changes to such documents.

Comment 1—Revisions Agreed to by the Regional Board Staff Have Not Been Incorporated into the Draft Permit

SBC, SBCFCD and the individual Permittees have reached a conceptual agreement with Regional Board staff regarding changes to Section II.L.3, II.F.9 and II.F.15.1 of the Draft Permit (Findings). Appended hereto as Exhibit D to this comment letter is the January 6, 2010 email (including attachments) from me to David Rice, Counsel to the Regional Board, describing the proposed changes Sections II.L.3, II.F.9 and II.F.15.1 to the Draft Permit. Based on our conversations with Regional Board staff, we anticipate receiving an errata sheet (or other similar documentation) from Board staff, which addresses and resolves the issues described in such email correspondence. However, to the extent such anticipated documentation does not conform to SBC’s understanding of those changes, SBC requests that the changes in the attached email correspondence be incorporated in their entirety into the Draft Permit.

Comment 2—Compliance with Obligations Under the Draft Permit is Economically Infeasible

The cost of implementing the new and expansive programs required under the Draft Permit impose significant economic burdens on the individual permittees making compliance with certain provision of the Draft Permit infeasible. Significantly, the estimated cost of compliance with the Draft Permit is more than *three* times the current version of the Permittees’ NPDES permit. The Permittees, like many local governments in California, are experiencing sharp and extensive declines in operating budgets and reductions in essential personnel due to the current recession. In midst of this economic climate, a threefold increase in the cost of compliance imposes an unreasonable obligation on the SBCFCD and the individual Permittees. Any further economic slowdown, or a slower than expected recovery,

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could substantially limit the permittees ability to implement the required programs.

Comment 3—Issues Regarding Incorporation of TMDLs into the Draft Permit Have Not Been Sufficiently Resolved

A. Expression of Wasteload Allocations May be Improperly Construed as Imposing Numeric Effluent Limits

Ambiguity remains in the Draft Permit regarding the nature of total maximum daily loads (TMDLs) wasteload allocations (“WLA”) in the Draft Permit. Regional Board staff has agreed to incorporate a robust best management practices (“BMP”) implementation plan, which builds upon the previously approved TMDL Implementation Plans for the Middle Santa Ana River Watershed Bacteria Indicator TMDL and the Big Bear Lake Nutrient TMDL for Dry Hydrological Conditions. This BMP implementation plan is expected to be developed and approved within the first two years of the Draft Permit term, and will be enforceable and become the final Water Quality Based Effluent Limits (“WQBELs”). However, we object to portions the Draft Permit that describe how the WQBEL development process will occur. SBC remains concerned that such language could be misinterpreted as imposing numeric effluent limits that are potentially applicable to runoff pursuant to these approved TMDLs. As written, any exceedance of such effluent limits under the Draft Permit could be construed as a violation despite efforts by the permittee(s) to minimize the TMDL pollutants—regardless of whether the beneficial uses are in fact impaired. Language in the Draft Permit should be modified to expressly state that numeric effluent limits will not be imposed during the permit term unless the BMP implementation plan is not successful.

B. Anti-backsliding Provisions May be Implicated by Imposing Numeric Effluent Limits

As further addressed in SBC’s prior comment letters, it is far from clear, based on the current state of the law, whether the anti-backsliding provision would act to preclude subsequent modifications to the Draft Permit. SBC is concerned that to the extent any WQBEL—based on the WLA for the Middle Santa Ana River Watershed Bacteria Indicator TMDL and the Big Bear Lake Nutrient TMDL for Dry Hydrological Conditions—are expressed as numeric effluent limits, the anti-backsliding provisions of section 402(o) of the Clean Water Act (“CWA”) may preclude adoption of less stringent limits even if the underlying water quality objectives are changed. If any such WQBELs are expressed as numeric effluent limits in the Draft Permit (only after a showing that the BMP implementation plan was not successful), SBC objects to such limits to the extent the Regional Board considers these limits to be subject to federal anti-backsliding requirements. Consistent with U.S. EPA’s

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interpretation, SBC believes that the anti-backsliding requirements of section 402(o) of the CWA do not apply to revisions to effluent limitations made *before* the scheduled date of compliance for those limitations. U.S. EPA, Waster Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California (California Toxics Rule), 65 Fed. Reg. 31682, 31704) (May 18, 2000); *see Communities for a Better Env't. v. State Water Res. Control Bd.* (2005) 132 Cal. App. 4th 1313, 1331-32.

In addition, in its September 9 comment letter, SBC described three real-world scenarios related to the forthcoming changes to bacteria objectives in the Middle Santa Ana River. We specifically asked Regional Board staff how such anti-backsliding provision would apply in each particular circumstance. To date, Regional Board staff has provided no explanation of how less stringent effluent limits could be applied in the Draft Permit after the Basin Plan is amended to adopt less stringent bacteria standards. We again request that Regional Board adequately respond to this important issue.¹

Comment 4—Several Obligations Imposed by the Draft Permit Constitute Unfunded Mandates in Violation of Article XIII B, Section 6 of the California Constitution

The Draft Permit contains numerous unfunded State mandates. Unless funding is provided for the implementation of these provisions by local governments, such aspects of the Draft Permit violate Article XIII B, Section 6 of the California Constitution. Significantly, Section 6 provides that: “Whenever the Legislature or any state agency mandates a *new* program or *higher level of service* on any local government, the State shall provide a subvention of funds to reimburse that local government of the costs of the program or increased level of service” Cal. Const. art. XIII B, § 6 (emphasis added). This provision “was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task.” *County of Fresno v. State of California* (1991) 53 Cal. 3d. 482, 487. Section 6, therefore, provides for reimbursement, through subvention, “to local governments for the cost of complying with certain requirements mandated by the state.” *County of Los Angeles v. Comm’n on State Mandates* (2007) 150 Cal. App. 4th 898, 905.

¹ In a letter dated September 9, 2009, U.S. EPA offered only vague reassurances that anti-backsliding would not pose a significant barrier provided that the state performed a proper anti-degradation analysis. However, this would only be true if the receiving water body was already meeting the water quality standard. Federal regulations explicitly exclude “changes in law or regulation” (such as revising a water quality standard) from the list of anti-backsliding exceptions.

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Several of the obligations imposed by the Draft Permit are “new” programs because the Regional Board did not exercise its discretion to impose these requirements in earlier permits. *See County of Los Angeles v. Comm’n on State Mandates* (2003) 110 Cal. App. 4th 1176, 1189. In addition, other requirements constitute a “higher level of service” because such obligations have been increased or made significantly more prescriptive than those set forth in prior municipal stormwater permits issued by the Regional Board to the SBCFCD or the individual co-Permittees. Such obligations include, but are not limited to, the requirement to establish significant new surveillance, monitoring, and inspection procedures to determine compliance and non-compliance with local ordinances.

Comment 5—The Draft Permit Imposes Unreasonable Deadlines for Completing Certain Program Enhancements

As discussed in its September 9, 2009 comment letter, the Draft Permit places unreasonable deadlines on the permittees to incorporate a litany of obligations, including, but not limited to, preparing guidance, constructing databases, formulating inspection programs, and completing certain program evaluations. SBC requests that several sections of the Draft Permit be revised as follows:

Septic System Program (IX.F)—Extend completion schedule from 24 to 36 months. This obligation requires modification to an existing program; thus, its completion is a lower priority.

Public Education BMP Guidance (XII.E)—Extend completion schedule from 12 to 24 months. The existing BMP education programs currently address most pollutants, and BMP resources are available from other sources. Accordingly, completion of this task is a lower priority.

Post Construction Database Activities (XI.I.2, XI.J.2)—Extend completion schedule from 12 to 18 months. This extension will provide time for the permittees to link this activity with the local implementation plans (“LIP”), low-impact development (“LID”) and water quality management plans (“WQMP”) priority activities, as several elements of post-construction database development relate to these permit requirements.

Risk-Based Inspections (X.A.3)—Extend completion schedule from 18 to 24 months. This is an enhancement of an existing program that is not a high priority permit requirement. Thus, such an extension is reasonable.

Effectiveness Evaluation (XVIII.B)—Extend the deadline to propose changes to how program effectiveness is evaluated from the first annual report completed after permit adoption to the second such annual report. The deadline proposed under the Draft Permit is premature.



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The effectiveness evaluation is an important program assessment tool, which should consider the LID, WQMP and LIP program elements that will be under development in 2010-2011. Extending the reporting schedule until the fall of 2011 provides SBC the opportunity to include these priority permit elements when proposing changes to the program effectiveness evaluation.

Pathogen Control Ordinance (VII.D)—Extend completion schedule from 36 to 48 months in order to coordinate the pathogen control ordinance with the residential BMP program, which includes development of home owners association (“HOA”) control measures. We propose to develop the elements of this ordinance while developing the residential BMP program (*See* Section X.E.1 of the Draft Permit). Thus, a draft ordinance would be completed within 36 months of permit adoption. However, SBC requests an additional 12 months in order to provide adequate time for each permittee to complete the ordinance adoption process.

Conclusion

For the reasons set forth herein, SBC requests that the Regional Board amend or revise the Draft Permit consistent with these comments.

Sincerely,

Chris M. Amantea /s/

Chris M. Amantea

cc: David Rice, Regional Board Counsel (via email only)
Gerard J. Thibeault (via email only)
Matt A. Yeager (via email only)
Scott M. Runyan (via email only)
Dan Ilkay (via email only)